Nos. 14-556, 14-562, 14-571, 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES,
Director, Ohio Department of Health, et al.,

Respondents.

[Additional Case Captions Listed On Inside Front Cover]

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* PROTECTMARRIAGE.COM – YES ON 8, DENNIS HOLLINGSWORTH, MARTIN GUTIERREZ, AND MARK JANSSON IN SUPPORT OF ALL RESPONDENTS

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VALERIA TANCO, et al.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM,
Governor of Tennessee, et al.,

Respondents.

APRIL DEBOER, et al.,

Petitioners,

v.

RICK SNYDER,
Governor of Michigan, et al.,

Respondents.

GREGORY BOURKE, et al.,

Petitioners,

v.

STEVE BESHEAR,
Governor of Kentucky, et al.,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae ProtectMarriage.com – Yes on 8 is the California ballot measure committee primarily formed to support Proposition 8 in the 2008 general election.[2] *Amici* Dennis Hollingsworth, Martin Gutierrez, and Mark Jansson are Official Proponents of Proposition 8.[3] Together, *amici* offer this brief relative to the interests of the thousands of volunteers, donors and other people who have publicly supported their efforts to protect the traditional meaning of marriage, many of which have suffered as victims of the widespread threats, harassment and reprisals addressed in this brief.

Two years ago, this Court declined to address the merits of Prop 8's constitutionality. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Since then, Prop 8's enforcement has remained enjoined by the decision of a single trial judge who pronounced that *amici* – and

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[1] Parties to these cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their counsel, and the Proposition 8 Legal Defense Fund (a nonprofit organization) made any monetary contribution intended to fund the preparation or submission of this brief.

[2] California Proposition 8 (2008) ("Prop 8") amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5.

[3] Cal. Elec. Code, §§ 342, 9001; *Perry v. Brown*, 52 Cal.4th 1116, 1127 (Cal. 2011).

the majority of California voters – had "place[d] the force of law behind stigmas against gays and lesbians," *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 973 (N.D. Cal. 2010), "single[d] out gays and lesbians and legitimate[d] their unequal treatment," *id.* at 979, "enact[ed] a moral view that there is something 'wrong' with same-sex couples," *id.* at 1002, and "disadvantage[d] gays and lesbians without any rational justification," *id.* at 1003.

Similarly, Petitioners now ask this Court to permanently brand a sincerely held belief of millions of Americans as irrational, mean-spirited malice. Perceiving the substantial risk of increased harassment, intimidation, and reprisals against those who believe in traditional marriage, that could follow a finding in this case of unconstitutional *animus*, *amici* submit this brief to assert the interests of themselves, the tens of thousands of people who publicly supported *amici's* efforts to enact and defend Prop 8, and the millions of Californians who voted for Prop 8.

Amici recognize that marriage is an important issue and people of good will can and do disagree about it. America should be a place where passionate moral disagreements about important issues such as marriage are expressed with respect, thoughtfulness, and civility, and without fear or threats of retaliation – on both sides of the issue.

SUMMARY OF ARGUMENT

The vilification of those who support the traditional understanding of marriage as between a man and a woman has reached a fever pitch. In America today, defending traditional marriage requires a great deal of "civic courage." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). As shown by a substantial and growing body of evidence, supporting traditional marriage today often generates significant hostility, harassment and reprisals against those people and groups courageous enough to express their support publicly. Although many incidents likely have gone unreported,[4] available sources help illustrate what the New York Times has called the "ugly specter of intimidation" experienced by people who supported Proposition 8 in California,[5] as well as harassment and reprisals experienced by others who have supported the traditional understanding of marriage outside California or in contexts other than Prop 8.

To be fair, some advocates for redefining marriage have condemned certain instances of harassment and reprisals. *See, e.g.*, Thomas M. Messner,

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[4] *See* Declaration of Sarah Troupis in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-2292-VRW) ECF No. 187-13 (asserting that fear of "further threats and harassment" deterred some individuals from submitting declarations in litigation).

[5] Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009), at BU3.

The Price of Prop 8, at 13 n.111 (2009) ("*Price of Prop 8*") (collecting examples);[6] Press Release, LGBT Organizations Release Joint Statement Regarding the Shooting at Family Research Council (FRC), GLAAD (Aug. 15, 2012).[7] In some cases, however, proponents of redefining marriage have responded by soft pedaling, downplaying, and generally disparaging the reality that people who support traditional marriage in America today face the genuine risk of harassment and reprisals. This Court, in contrast, has recognized that such harassment and reprisals are "cause for concern." *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).[8] *See also* Reply Brief for Appellant at 28-29, *Citizens United*, 130 558 U.S. 310 (No. 08-205) (counsel for plaintiffs describing, in different case, "widespread economic reprisals" against financial supporters of Prop 8' as an "unsettling" consequence of disclosing donor information on searchable websites); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011) (stating that "hostility engendered by

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[6] *Available at* http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8.

[7] *Available at* http://www.glaad.org/blog/lgbt-organizations release-joint-statement-regarding-shooting-family-researchcouncil-frc.

[8] There, the Court referred to examples, provided by two *amici*, of "recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." *Citizens United*, 558 U.S. at 370.

public advocacy of traditional marriage should concern every citizen" [internal quotes omitted]).[9]

Today, the cause of redefining marriage to include same-sex unions receives support from the highest

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[9] Evidence regarding harassment against people who support traditional marriage, including evidence regarding harassment against supporters of Prop 8 in California, was presented to this Court in *Doe v. Reed*, 561 U.S. 186 (2010). The Court ruled that, as a general matter, disclosure of referendum petitions does not violate the First Amendment to the U.S. Constitution, but left open the possibility of a First Amendment challenge to disclosure of a particular referendum petition. *See id.* at 188. Accordingly, evidence of the particular harassment presented was not relevant to the Court's decision. The Court's decision in *Reed* affirmed the decision of the court of appeals, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), which had reversed the decision of the district court, *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash. 2009). Similar evidence of harassment was presented to the district court on remand for consideration of the as-applied challenge, *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011), *appeal dismissed as moot*, 697 F.3d 1235, 1237 (9th Cir. 2012), as well as to a district court in a case involving similar issues arising under public disclosure laws of California, *see ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914 (E.D. Cal. 2011) (summary judgment ruling); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (preliminary injunction ruling). Neither district court concluded that the harassment presented rose to the level required for the rare case where extraordinary judicial intervention with legislatively enacted public disclosure policies would be required to protect First Amendment interests. Both courts, however, expressed concern about harassment. *See Reed*, 823 F. Supp. 2d at 1212 (stating that "hostility" engendered by "public advocacy" of traditional marriage "should concern every citizen"); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d at 1219 ("[T]he Court regards with contempt numerous of the acts about which Plaintiffs complain. . . ").

political office, *see President Obama Supports Same-Sex Marriage*, The White House (May 10, 2012),[10] while private citizens who support traditional marriage through democratic processes face the risk of harassment and reprisals. Today, the cause of redefining marriage receives significant financial support from billionaires and business leaders, *see, e.g.*, Clare O'Connor, *Jeff Bezos Joins Growing List Of Billionaires Backing Same-Sex Marriage*, Forbes (July 27, 2012, 12:34 PM),[11] while ordinary people risk professional jeopardy and social vilification if they publicly support traditional marriage. Today, many major corporations proudly support same-sex marriage and related causes, *see, e.g.*, *Corporate Sponsors*, The Human Rights Campaign,[12] while even the United States Congress struggled to find a major law firm willing to help defend the federal marriage law in court, *see* Letter from Paul D. Clement to Robert D. Hays (Apr. 25, 2011).[13]

Proponents of redefining marriage have come to enjoy significant political and cultural power in this country. *See, e.g.*, Br. on the Merits for Respondent

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[10] *Available at* http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage.

[11] *Available at* http://www.forbes.com/sites/clareoconnor/2012/07/27/jeff-bezos-joins-growing-list-of-billionaires-backing-samesex-marriage/.

[12] *Available at* www.hrc.org/the-hrc-story/corporate-partners.

[13] *Available at* http://online.wsj.com/public/resources/documents/042511clementresign.pdf.

the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 51-54, *United States v. Windsor*, No. 12-307 (Jan. 22, 2013). If they do not enjoy as much power as they would like, one likely reason is the growing public awareness of the harassment and reprisals directed against people and groups that continue to stand for traditional marriage. *See, e.g.*, George Will, *Liberal Intimidation on Referendum 71*, Kitsap Sun (Oct. 31, 2009) (citing reprisals including some against people who support traditional marriage and stating that "[i]t is time to speak up").[14]

Despite the chilling effect of political reprisals and other acts of hostility, many people in this country continue to demonstrate great civic courage in endeavoring to preserve marriage as a vital social institution that promotes the public interest in the unique relationship between mothers, fathers, and children. This perseverance, often in the face of great hostility, testifies to their good will and honest belief that society benefits from strengthening marriage rather than redefining it in a way that would divorce it from its roots in human biology and the needs of children. Those views are worthy of consideration and the people who hold them are worthy of respect.

For this reason, and for the reasons set forth by the Respondents, the Court should reject any argument

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[14] *Available at* http://www.kitsapsun.com/news/2009/oct/31/george-will-liberal-intimidation-on-referendum/#ixzz2I03PTqRx.

made in this case that support for traditional marriage is irrational, bigoted, or worse, *see, e.g.*, David Boies, *Gay Marriage and the Constitution*, Wall St. J. (July 20, 2009) (describing Prop 8 as "the residue of centuries of figurative and literal gaybashing").[15] Declaring traditional marriage to be an irrational and bigoted viewpoint *per se* would encourage even greater hostility than already exists against those who seek to preserve marriage as a fundamentally pro-child social institution that benefits all society. *Cf. Board of Trustees of University of Alabama v. Garrett*, 538 U.S. 356, 375 (2001) (Kennedy, J., concurring) ("the law can be a teacher"); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 963 (Mass. 2003) (applying principle that government policy can "confer[ ] an official stamp of approval" on social attitudes and ideas).

ARGUMENT

I. Supporters of California's Prop 8 Have Experienced Severe Harassment and Reprisals.

Events experienced by supporters of California's Proposition 8 show that those who publicly support traditional marriage have been, and continue to be, subject to threats, harassment, and reprisals. Much of the documentation of harassment against people and groups that support traditional marriage centers

[15] *Available at* http://online.wsj.com/article/SB124804515860263587.html.

on Proposition 8, which amended the California constitution to restore marriage's longstanding definition following the California Supreme Court's 4-to-3 decision to redefine marriage. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (*per curiam*) (explaining that incidents of past harassment "substantiated" concerns harbored by witnesses unwilling to testify at a televised trial and citing a compilation of "71 news articles detailing incidents of harassment related to people who supported Proposition 8"); *Citizens United*, 558 U.S. at 370 (2010) (citing briefs submitted by *amici* providing examples of harassment including against Proposition 8 supporters and stating that the "examples cited by *amici* are cause for concern"); *Doe v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring) (citing "widespread harassment and intimidation suffered by supporters of California's Proposition 8"); *Citizens United*, 558 U.S. at 480-483 (Thomas, J., concurring in part and dissenting in part) (discussing "intimidation tactics" used against Proposition 8 supporters).[16]

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[16] Other documentation includes: On Application for Immediate Stay of the District Court's Order Permitting Public Broadcast of Trial Proceedings at 15, *Hollingsworth*, 558 U.S. 183 (stating that "the record reflects repeated harassment of Prop 8 supporters" and providing citations to record); Brief of *Amicus Curiae* Institute for Marriage and Public Policy in Support of Defendant-Intervenors, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (entire brief devoted to documenting harassment against people and groups that supported Proposition 8); Petitioners' Brief at 2-7, 10-11, *Doe v. Reed*, 561 U.S. 186 (No. 09-559); Reply Brief for Appellant at 28-29, *Citizens United*, 558

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Harassment against Prop 8 supporters included acts of vandalism to their homes and other property, *see, e.g.*, *Price of Prop 8*, *supra*, at 3-4 & nn.8, 12, 15, 17-18, as well as to cars and other vehicles, *see id.* at 3 & nn.9-12, 15-16. Houses of worship also were vandalized. *See id.* at 4 & nn.21-26. For example, "swastikas and other graffiti" were reportedly scrawled on the walls of the Most Holy Redeemer Catholic Church in San Francisco, a parish "widely known" as being "gay friendly." Meredith May, *Vandals Desecrate Pro-Gay Catholic Church*, S.F. Chron. (Jan. 6, 2009), at B-3.[17] In the days after Prop 8 passed, many Mormon Church buildings were also vandalized. *See* Jennifer

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U.S. 310 (No. 08-205); Brief of the Institute for Justice as *Amicus Curiae* in Support of Petitioners at 17-18, *Doe v. Reed*, 561 U.S. 186 (No. 09-559); Brief of *Amicus Curiae* Alliance Defense Fund in Support of Appellant at 17-22, *Citizens United*, 558 U.S. 310 (No. 08-205); Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 Minn. L. Rev. 1755, 1760-61 (2012) (stating that "evidence of the harassment campaign against donors to Proposition 8" was "extensive" and "widespread"); Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 Washburn L.J. 79, 105 (2010) (stating that people in California who supported Proposition 8 were "subject to widespread political reprisal, stalking, assault, intimidation, employment discrimination, economic and other forms of retaliation" and "organizations, including churches, that had supported the measure were attacked, vandalized, and targeted for revenge").

[17] *Available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/06/BA5B1540PH.DTL. *See also Prop 8 Protestors Vandalize Church*, KGO-TV (Jan. 4, 2009), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=6584961.

Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008).[18]

Prop 8 supporters also experienced other kinds of harassment and hostility. *See, e.g.*, *Price of Prop 8*, *supra*, at 5-7 & nn.34-41, 47-52. For example, supporters holding signs and distributing materials were reportedly "victims of physical assaults such as being spat upon and having hot coffee thrown on them by passengers in passing automobiles." Decl. of Ronald Prentice in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-2292-VRW). "[S]everal donors" to Prop 8 allegedly "had . . their employees harassed, and . . received hundreds of threatening emails and phone calls." Decl. of Frank Schubert in Support of Defendant-Intervenors' Motion for a Protective Order at 6, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292VRW).

Other incidents of harassment revealed even greater planning and determination to do harm. One individual, for example, allegedly became the subject of a flyer distributed in his town that showed his name and photo, labeled him a "Bigot," and stated the amount of his donation to Prop 8 and his association with a particular Catholic parish. *See* Decl. of John Doe #2 in Support of Plaintiffs' Motion for

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[18] *See also* Chelsea Phua, *Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote*, Sacramento Bee (Nov. 9, 2008).

Preliminary Injunction at 2, Ex. A, *ProtectMarriage.com v. Bowen*, No. 2:09-cv-0058MCE-DAD (E.D. Cal. Jan. 15, 2009). In another case, two women reportedly painted the words "Bigots live here" on the window of an SUV and parked the vehicle in front of a household that had supported Prop 8. *See* Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. Chron. (Oct. 27, 2008), at B1.

Mormons, in particular, were openly and systematically targeted for supporting Prop 8.[19] The

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[19] *See, e.g., Activists Target Mormons for Gay-Marriage Ban's Success in California*, Fox News (Dec. 1, 2008), http://www.foxnews.com/printer_friendly_story/0,3566,459544,00.html. The San Francisco Chronicle reported in 2008 that "[o]ne Web site run by a Prop. 8 opponent, Mormonsfor8.com, identifies the name and hometown of every Mormon donor." Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. Chron. (Oct. 27, 2008), at B-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/27/BAP113OIRD.DTL. This news article also reported that, "[o]n the Daily Kos, the nation's most popular liberal blog, there is a campaign to use that information to look into the lives of Mormons who financially support Prop. 8." *Id.* In a piece published after the Prop 8 vote, one leading gay-rights activist in West Hollywood was reported to have said, "'The main finger we are pointing is at the Mormon church.'" Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, Wall St. J. (Dec. 27, 2008) (quoting Vic Gerami and describing him as "a leading gay activist in West Hollywood, Calif."), http://sec.online.wsj.com/article/SB123033766467736451.html. One prominent gay-rights figure reportedly said, in response to a Mormon individual who asked why his church was being targeted, "We are going to go after your church every day for the next two years unless and until Prop 8 is overturned." Maggie Gallagher, *Above the Hate*, Real Clear Politics (Nov. 26, 2008) (internal quotations omitted), http://www.realclearpolitics.com/articles/2008/11/above_the_hate.

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extensive and unapologetic anti-Mormon bigotry surrounding Prop 8 was typified by the infamous "Home Invasion" television ad, which "depict[ed] two [male] Mormon missionaries invading the home of a lesbian couple, ransacking their belongings, and tearing up their marriage license." *Price of Prop 8*, *supra*, at 8. "Hi, we're from the Church of Jesus Christ of Latter-day Saints," says one of the Mormon missionaries. "We're here to take away your rights," says the other missionary. The ad concludes with the message, "Say NO to a Church taking over your government. Vote *NO* on Proposition 8," and is still available for viewing on YouTube. CourageCampaign, *Home Invasion: Vote No on Prop 8*, YouTube (Oct. 31, 2008).[20]

African-Americans also suffered instances of hostility related to Prop 8. *See* Memorandum from Kathryn Kolbert, President, People for the American Way Foundation, to Progressive Allies and Journalists (Nov. 7, 2008).[21] "According to eyewitness reports

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html. Similarly, after the Prop 8 vote, a San Francisco Supervisor reportedly said, "The Mormon church has had to rely on our tolerance in the past, to be able to express their beliefs. . . . This is a huge mistake for them. It looks like they've forgotten some lessons." Thomas Sowell, *The Right To Win*, Townhall.com (Nov. 19, 2008), http://townhall.com/columnists/thomassowell/2008/11/19/the_right_to_win/page/full/. In short, "Mormons, in particular," were "singled out" and "widely blamed" for the success of Prop 8. Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 Liberty U. L. Rev. 537, 555 (2010).

[20] *Available at* http://www.youtube.com/watch?v=q28UwAyzUkE.

[21] *Available at* http://media.pfaw.org/pdf/prop-8-memo.pdf (describing as "inexcusable" the "speed with which some white gay

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published on the Internet," one prominent news source reported, "racial epithets have been used against African Americans at protests in California – with some even directed at blacks who are fighting to repeal Prop. 8." Alison Stateman, *What Happens If You're on Gay Rights' 'Enemies List'*, Time (Nov. 15, 2008).[22]

Prop 8 supporters have also been targeted with death threats. One such threat against the mayor of Fresno allegedly stated, "Hey Bubba, you really acted like a real idiot at the Yes of [sic] Prop 8 Rally this past weekend. Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter." John-Thomas Kobos,

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activists began blaming African Americans – sometimes in appallingly racist ways" for the passage of Proposition 8); Wayne Besen, *Truth Wins Out Condemns Racial Intolerance Within the LGBT Community Following Proposition 8 Defeat*, Truth Wins Out (Nov. 7, 2008), https://www.truthwinsout.org/blog/2008/11/974 (expressing "grave disappointment" with "those in the LGBT community" who engaged in "scapegoating minorities").

[22] *Available at* http://content.time.com/time/nation/article/0,8599,1859323,00.html. *See also* Thomas Sowell, *The Right To Win*, Townhall.com (Nov. 19, 2008) (reporting that "racial epithets were hurled at blacks in Los Angeles" and "[b]lacks who just happened to be driving through Westwood, near UCLA, were accosted in their cars and, in addition to being denounced, were warned, 'You better watch your back' "), http://townhall.com/columnists/thomassowell/2008/11/19/the_right_to_win/page/full/; Rod, *N-Word Hurled at Blacks During Westwood Prop 8 Protest*, Rod 2.0 (Nov. 7, 2008, 12:34 PM), http://rodonline.typepad.com/rodonline/2008/11/n-word-andraci.html (reporting several incidents of racial backlash).

Proposition 8 Email Threats, KFSN-TV (Nov. 7, 2008).[23] The New York Times reported that donors to groups supporting Prop 8 received death threats. Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009), at BU3. An official proponent of Prop 8 reported he was "threatened to be killed" and "told to leave the country." Declaration of Hak-Shing William Tam in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-2292-VRW).

Other incidents of retaliation against Prop 8 supporters involved actual, personal physical violence. For example, a Prop 8 supporter was taken to the hospital for stitches after reportedly being punched in the face by someone who seized several Yes on 8 campaign signs and yelled "What do you have against gays?" *Attack Outside of Catholic Church Part of 'Wave of Intimidation,' Says Yes on 8*, Catholic News Agency (Oct. 15, 2008).[24] *See also Price of Prop 8*, *supra*, at 10 & nn.80-83 (documenting incident involving elderly

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[23] *Available at* http://abclocal.go.com/story?section=news/local&id=6494921. *See Price of Prop 8*, *supra*, at 9-10 (discussing additional details and providing sources).

[24] *Available at* http://www.catholicnewsagency.com/new.php?n=14069. *See* Seth Hemmelgarn, *Prop 8 Fight Gets Ugly on Both Sides*, Bay Area Reporter (Oct. 16, 2008), http://www.ebar.com/news/article.php?sec=news&article=3403; *Prop. 8 Supporter Allegedly Attacked In Modesto*, KCRA TV (Oct. 15, 2008), http://www.nbcbayarea.com/news/politics/Prop_8_Supporter_Allegedly_Attacked_In_Modesto.html.

woman present at an anti-Prop 8 protest who was allegedly spit at while protestors knocked out of her hands and stomped on a cross she carried); *id.* at 10 & nn.84-88 (documenting incident involving small group of Christians who were allegedly harassed and received police protection when an angry crowd apparently took them for Prop 8 supporters as they prayed and sang hymns on a sidewalk).

In addition, there have been numerous reports of "widespread economic reprisals." Reply Brief for Appellant at 28-29, *Citizens United*, 558 U.S. 310 (No. 08-205). Employers of Prop 8 supporters have been targeted, resulting in some of them having to resign, take a leave of absence, or otherwise lose professional opportunities. *See* Editorial, *Prop. 8 – Boycott, or Blacklist?*, L.A. Times (Dec. 10, 2008) (stating that "postelection boycott efforts" by "defenders of same-sex marriage" escalated into "a vengeful campaign against individuals who donated" in support of Prop

8, "usually in the form of pressure on their employers").[25, 26]

Evidence of harm to those who publicly supported Prop 8 persist to this day, even years after its adoption: "Just days after taking the job, Brendan Eich has resigned as chief executive of Mozilla, the maker of Firefox, after coming under fire for his 2008 support of Proposition 8." Salvador Rodriguez, *Mozilla CEO Brendan Eich resigns under fire for supporting Prop. 8*, L.A. Times (Apr. 3, 2014).[27] The Java-Script founder was forced to resign "after he came under

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[25] *Available at* http://www.latimes.com/news/opinion/editorials/la-ed-boycott10-2008dec10,0,2703213.story. *See* additional sources in *Price of Prop 8*, *supra*, at 11 & nn.89-97, and incidents occurring long after Prop 8 vote at Juliet Macur, *Facing Criticism, U.S. Official Quits*, N.Y. Times (May 6, 2011) (reporting that high level staff member of U.S. Olympic Team resigned based on criticism involving his support of Prop 8), *available at* http://www.nytimes.com/2011/05/07/sports/olympics/07usoc.html, and Phillip Matier and Andrew Ross, *Prop. 8 Aid Puts Paramount Board Member on Hold*, S.F. Chron. (Jan. 20, 2010) (reporting that donation to Prop "appears to have cost" the donor "his seat on the board that oversees Oakland's historic Paramount Theatre"), http://www.sfgate.com/bayarea/matier-ross/article/Prop-8-aidputs-Paramount-board-member-on-hold-3202211.php#ixzz2IF0AHhbw.

[26] While boycotting businesses that engage in certain corporate practices or take certain corporate positions is an accepted and time-honored American political tactic, punishing businesses or other employers because of their employees' personal political viewpoints is a very different, troubling tactic that betrays a raw desire to suppress a particular viewpoint under threat of losing one's very livelihood.

[27] *Available at* http://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403.

sharp criticism for donating $1,000 to a campaign that supported Proposition 8." *Id.*

As explained below, *infra* at Section IV, a decision in this case convicting traditional marriage supporters of irrational *animus* would only serve to embolden those who have carried out these personal vendettas and encourage further harm of this type.

II. In Addition to Prop 8, Other Supporters of Traditional Marriage Have Also Experienced Severe Harassment and Reprisals Nationwide.

The events surrounding Prop 8 created new awareness in the minds of many Americans about the genuine risk of harassment and reprisals faced by people and groups that support traditional marriage. But hostility against supporters of traditional marriage has not been limited to California's experience with Prop 8.

In Michigan, for example, just days after the Prop 8 vote in California, a group called "Bash Back!" allegedly invaded a church and disrupted a service "because of the church's well-known Christian views on marriage and homosexual behavior." News Release, Alliance Defending Freedom, Anarchists That Invaded Mich. Church Lose to the Rule of Law (July 12, 2011).[28] According to the church's attorneys,

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[28] *Available at* http://www.adfmedia.org/News/PRDetail/4974.

some members of the group staged a protest outside the church while other members of the group "deceptively entered the building" wearing plain clothes. *Id.* Then, at a "coordinated time," members of the group "sprang up shouting religious slurs, unfurling a sign, and throwing fliers around the sanctuary while two women began kissing near the podium." *Id.* Affiliates of Bash Back! also have allegedly vandalized churches in other states.[29]

In 2011, when New York was debating whether to legislatively redefine marriage, a state senator who opposed the proposal reportedly received death threats against him and his family. *See* Sarah Armaghan, *Same-sex Marriage Foe State Sen. Ruben Diaz & Family Hit with Death Threats over Stance on Issue*, N.Y. Daily News (June 1, 2011).[30] When the lawmaker hosted a rally in support of traditional marriage, an individual reportedly "wrote on Twitter that he wanted to sexually assault [the senator's] daughter." Patrick B. Craine, *Pro-marriage New York Senator Faces Death*

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[29] *See* Complaint at ¶ 67, *Mount Hope Church v. Bash Back!*, No. 1:09-cv-00427-RHB (W.D. Mich. July 11, 2011) (alleging that Bash Back! vandalized a Mormon church building in the State of Washington); *Churches Vandalized, Ransacked, and Threatened With Disruption*, Speak Up (May 27, 2010), http://blog.speakupmovement.org/church/uncategorized/churches-vandalized-ransacked-and-threatened-with-disruption/ (alleging that Bash Back broke into and vandalized an Evangelical church in Indiana).

[30] *Available at* http://www.nydailynews.com/new-york/bronx/same-sex-marriage-foe-state-sen-ruben-diaz-family-hit-death-threats-stance-issue-article-1.130499#ixzz2IFABOEVo.

Threats, Barraged with Hate Calls, Lifesitenews.com (June 7, 2011).[31] Throughout this harassment, the senator reportedly received little if any support from fellow lawmakers: "'[T]he feeling is that you reap what you sow,'" a local "political source" explained. Armaghan, *supra*.

Voters have also debated marriage and related issues in the state of Washington.[32] In 2009, voters considered a ballot measure, known as Referendum 71, which would have rejected a law passed by the state legislature that equated same-sex domestic partnerships with marriage.[33] On the same day that a local newspaper published an article reporting her support for Referendum 71, a candidate for the Washington House of Representatives allegedly received a death threat against her and her family. *See* Plaintiffs' Response to Defendants' Motion for Summary Judgment at 1-3, *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011) (No. 3:09-cv-05456-BHS). In another incident, someone allegedly responded to a

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[31] *Available at* http://www.lifesitenews.com/news/pro-marriage new-york-senator-faces-death-threats-barraged-with-hate-calls.

[32] In 2012, Washington voters approved same-sex marriage legislation passed by the state legislature. *See, e.g.*, Rachel La Corte, *Washington Voters Approve Gay Marriage*, Baltimore Sun (Nov. 8, 2012), http://www.baltimoresun.com/news/maryland/bal-washington-gay-marriage-story.html

[33] Voters rejected the ballot measure thereby approving the legislation. *See, e.g.*, Rachel La Corte, *Voters Approve 'Everything but Marriage' Bill*, KOMOnews.com (Nov. 5, 2009), *available at* http://www.komonews.com/news/69333537.html.

YouTube video showing this candidate explain her support for traditional marriage by posting a comment stating, "Oh my God, this woman is so [expletive deleted] stupid. Someone please shoot her in the head, again and again. And again." *Id.*

Newsweek, in a story about harassment involving Referendum 71, described an Internet post that stated, "I advocate using violence against the property of ALL of those who are working tirelessly to HURT my family; starting with churches and government property . . any NORMAL man would be driven to get a gun and kill those who tried such evil cruelty against his loved ones." Krista Gesaman, *Threats, Legal Action in Washington's Gay-Marriage Debate,* Newsweek (Sep. 8, 2009).[34] The posting specifically named the campaign manager for one of the groups supporting Referendum 71.[35] That campaign manager, in turn, reportedly "received many harassing and threatening emails," Plaintiffs' Renewed Notice of Motion and Motion for Protective Order 8, *Reed*, 823 F. Supp. 2d 1195 (No. 3:09-cv-05456-BHS), including one email from an individual who allegedly "stated that he hoped that [the campaign manager and his wife] would have to watch

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[34] *Available at* http://www.newsweek.com/threats-legal-action-washingtons-gay-marriage-debate-211642.

[35] *See* Letter from Stephen Pidgeon to Public Disclosure Commission Ex. 1 (Aug. 6, 2009), *available at* http://www.pdc.wa.gov/archive/commissionmeetings/meetingshearings/pdfs/2009/8.27.09.mod.pmw.pdf (reproducing Internet posting).

[their] daughters being molested and raped," Plaintiffs' Response to Defendants' Motion for Summary Judgment Ex. 13, at ¶ 4, *Reed*, 823 F. Supp. 2d 1195 (No. 3:09-cv-05456-BHS).

In 2009, shortly after Maine voters approved a ballot measure to overturn same-sex marriage legislation adopted by the state legislature,[36] the headquarters of a group that had supported the ballot measure allegedly received a voicemail stating, "'You will be dead. Maybe not today, not tomorrow. But soon you'll be dead.'" *Threats Made Against Gay Marriage Opponents in Maine*, Bangor Daily News (Nov. 9, 2009, 10:28 AM).[37] When a high school counselor in Maine appeared in an advertisement supporting traditional marriage, two ethics complaints were filed against him with a state licensing board, even though another teacher from the same school had appeared in an ad supporting same-sex marriage. *See* News Release, Alliance Defending Freedom, Complaints

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[36] Maine voters approved same-sex marriage in 2012. *See* Geoffrey A. Fowler, *Gay Marriage Gets First Ballot Wins*, Wall St. J. (Nov. 7, 2012), http://online.wsj.com/article/SB10001424052970204755404578102953841743658.html.

[37] *Available at* http://bangordailynews.com/2009/11/09/politics/threats-made-against-gay-marriage-opponents-in-maine/. *See Question 1 Backers Receive Death Threats, Former Homosexual Leader Says They Should Not Live in Fear*, Catholic News Agency (Nov. 16, 2009), *available at* http://www.catholicnewsagency.com/news/question_1_backers_should_not_live_in_fear_after_death_threats_former_homosexual_leader_says/ (reporting same death threat with slightly different wording and also reporting second death threat).

Dismissed Against Maine Counselor Who Supported Marriage (Apr. 12, 2010).[38] In another case, a woman from Maine alleges that, soon after she told a manager at work that "not everyone agrees with same-sex marriage," she was no longer scheduled for any hours and her position was later filled with someone else. *See Maine Sisters*, Marriage Anti-Defamation Alliance (Nov. 7, 2012) (footage from 2:30-3:15).[39]

In Minnesota, a former gubernatorial candidate alleges that he lost a professional opportunity in higher education because of his support for traditional marriage. *See* Doug Belden, *Tom Emmer Says He's a Victim of 'Political Bigotry,'* St. Paul Pioneer Press (Dec. 13, 2011). He claimed that a university had agreed to hire him to fill a teaching position, but that the university – which has denied that a "finalized agreement" was ever in place, *see id.* – changed course after other staff members "objected to his political views, including his opposition to same-sex marriage." Dennis Lien, *Emmer Says Hamline Reneged on Job Offer Because of Faculty Opposition*, St. Paul Pioneer Press (Dec. 13, 2011). *See* Belden, *supra*.

In Washington, D.C., a congressionally established university for deaf and hard of hearing students reportedly placed its chief diversity officer on administrative leave *simply for signing a petition* to allow Maryland voters to vote on the question of marriage

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[38] *Available at* http://www.adfmedia.org/News/PRDetail/3330.

[39] *Available at* http://marriageada.org/maine-sisters/.

directly. *See, e.g.*, Angela McCaskill, *Gallaudet University Chief Diversity Officer, Placed On Leave For Signing Anti-Gay Marriage Petition*, Huffington Post (Nov. 18, 2012);[40] *Statement from Gallaudet University President T. Alan Hurwitz Regarding the Chief Diversity Officer*, Post to *Facebook Page of Gallaudet University*, Facebook (Oct. 10, 2012, 12:56 PM EST).[41] After the petition signatures were posted online by a LGBT-oriented news source, a faculty colleague reportedly saw the signature and submitted a complaint to the university's president asking for disciplinary action. *See* Dominique Ludvigson, Op., *Marriage Debate: Reason to Worry About Free Speech and Religious Freedom*, St. Paul Pioneer Press (Oct. 29, 2012).[42] The university took nearly three months to reinstate the employee. *Angela McCaskill Reinstated: Gallaudet University Diversity Officer Returns Three Months After Signing Anti-Gay Marriage Petition*, Huffington Post (Jan. 8, 2013).[43]

The pattern of harassment and intimidation appeared to reach new heights when, on August 15, 2012, an individual allegedly shot and wounded a

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[40] *Available at* http://www.huffingtonpost.com/2012/10/10/angela-mccaskill-gallaudet-gay-marriage-petition_n_1955814.html.

[41] *Available at* https://www.facebook.com/Gallaudet1864/posts/10151220323200854.

[42] *Available at* http://www.twincities.com/opinion/ci_21882345/dominique-ludvigson-marriage-debate-reason-worry-about-free.

[43] *Available at* http://www.huffingtonpost.com/2013/01/08/angela-mccaskill-reinstated-gallaudet_n_2432838.html.

security guard at the Washington, D.C. headquarters of a conservative policy organization that supports traditional marriage. *See, e.g.*, Criminal Complaint, Nabors Aff. at ¶¶ 8, 9, 11, *United States v. Corkins*, No. 1:12-cr-00182-RWR (D.D.C. Aug. 16, 2012). The shooter's motives, as some might put it, did not appear to have been subjected to "adversarial testing." Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al. in Support of Respondents at 3, *Reed*, 561 U.S. 186 (No. 09-559) ("Lambda Br."). *See* Press Release, LGBT Organizations Release Joint Statement Regarding the Shooting at Family Research Council (FRC), GLAAD (Aug. 15, 2012) (emphatically condemning shooting and stating that "motivation and circumstances" behind it "are still unknown").[44] But according to evidence put forth by the Government, the shooter was witnessed "stat[ing] words to the effect of, 'I don't like your politics,'" and had in his possession "fifteen sandwiches from Chick-fil-A." Nabors Aff. at ¶¶ 8, 11, *supra*. The allegation about the Chick-fil-A sandwiches drew attention because the shooting occurred soon after several public officials throughout the country – including the mayor of Washington, D.C. – judged it to be an appropriate use of their bully pulpits to publicly criticize Chick-fil-A for statements made by a senior company executive in support of traditional marriage. *See, e.g.*, Todd Starnes, *D.C. Mayor Calls Chick-fil-A "Hate*

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[44] *Available at* http://www.glaad.org/blog/lgbt-organizations release-joint-statement-regarding-shooting-family-researchcouncil-frc.

Chicken," Fox News Radio (July 29, 2012) (explaining that "[o]fficials in at least a half dozen American cities have vowed to strong arm Chick-fil-A after the company's president said he supports the traditional view of marriage");[45] Alan Blinder, *Gray Won't Back Chick-fil-A in D.C.*, The Examiner (July 26, 2012);[46] *see also* Nabors Aff. at ¶¶ 8, 11, 14, *supra*, (asserting that "a senior executive of Chick-fil-A, Inc., recently announced publicly his opposition to same-sex marriage," this announcement "received substantial publicity," the institution where the shooting occurred "is a Christian conservative policy organization which supports traditional marriage," and the defendant's parents informed law enforcement officials that the defendant "has strong opinions with respect to those he believes do not treat homosexuals in a fair manner").

III. The Serious Concerns Raised by Harassment Against Supporters of Traditional Marriage Have Been Unjustly Downplayed.

In many cases, proponents of redefining marriage have responded to clear instances of harassment directed against traditional marriage supporters by disparaging the idea that people who support traditional marriage face a real risk of harassment. In

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[45] *Available at* http://radio.foxnews.com/toddstarnes/top-stories/d-c-mayor-calls-chick-fil-a-hate-chicken.html.

[46] *Available at* http://www.washingtonexaminer.com/article/2503362.

responding to attempts to expose hostility and harassment, for example, some proponents of same-sex marriage have used words such as "outlandish," Lambda Br. at 39, "cynical[ ]," *id.* at 39, "diversion strategy," Bret Evans & Jeff Krehely, *Voters as Victims: A Right-Wing Sleight of Hand*, Center for American Progress (Apr. 27, 2010),[47] "side issue" *id.*, "feint of victimization," Lambda Br. at 4, "sleight of hand," Evans & Krehely, *supra*, "hypocritical shamelessness," *id.*, "cynical political tactic," *Washington United for Marriage Condemns Harassment but Notes Pervasive Political Tactic*, Washington United for Marriage,[48] and "absurd," Zack Ford, *NOM Pushes Self-Victimization With New 'Marriage Anti-Defamation Alliance,'* Think Progress (Sept. 23, 2011, 2:03 PM).[49]

The reasons given for disparaging attempts to expose harassment against people with traditional viewpoints vary widely. The Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), for example, has argued at great length that harassment against people who support traditional marriage is

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[47] *Available at* http://www.americanprogress.org/issues/lgbt/news/2010/04/27/7683/voters-as-victims-a-right-wing-sleight-ofhand/.

[48] *Available at* http://washingtonunitedformarriage.org/shington-united-for-marriage-condemns-harassment-but-notespervasive-political-tactic/.

[49] *Available at* http://thinkprogress.org/lgbt/2011/09/23/327380/nom-pushes-self-victimization-with-new-marriage-antidefamation-alliance/?mobile=nc.

not "systematic." Lambda Br. at 3-4, 17-39. Whether systematic or not, harassment of any form is a problem for the people that experience it. Furthermore, evidence of harassment, including certain "news reports," *id.* at 23, has been written off on grounds that it has not been subjected to "adversarial testing," *id.* at 23 n.25, and was mostly "inadmissible hearsay," *id.* But this Court has credited sources such as news reports in this context, *see Hollingsworth*, 558 U.S. 183, 195 (citing compilation of "71 news articles detailing incidents of harassment related to people who supported Proposition 8"). Not every instance of harassment results in full-blown litigation.

Lambda Legal also heavily spins certain allegations or aspects of harassment against supporters of traditional marriage. For example, a violent attack against a Prop 8 supporter who was reportedly taken to the hospital for medical treatment, *see supra* at 15, was downplayed simply as "someone threw a punch in a scuffle," Lambda Br. at 25. Elsewhere, the "extensive media coverage" of certain harassment surrounding Prop 8 is attributed to the "exotic" nature of the harassment, *id.* at 22, rather than to widespread concerns about breakdown of political discourse or the "unsettling consequences" of "disseminating contributors' names and addresses to the public through searchable websites," Reply Brief for Appellant at 29, *Citizens United*, 558 U.S. 310 (No. 08-205); *see* Dick Carpenter, *Neighbor Against Neighbor*, Wall St. J. (Apr. 28, 2010) (stating that posting personal information about Prop 8 donors on Internet "led to death

threats, physical violence, vandalism and economic reprisals").[50] Similarly, an orchestrated church invasion – by a group that at one point in its history allegedly depicted itself wearing terrorist-like garb and brandishing weapon-like objects – is passed off as a "juvenile stunt" and "possible" trespass, "at most," Lambda Br. at 25;[51] a federal court, in contrast, has since issued a special order to protect the church's witnesses and permanently enjoined the defendant group from further "harassing or intimidating" the church's members and staff, *see* Permanent Injunction at 2, *Mount Hope Church v. Bash Back!*, 1:09-cv-00427RHB (W.D. Mich. July 11, 2011); Protective Order, *Mount Hope Church v. Bash Back!*, 1:09-cv-00427RHB (W.D. Mich. July 11, 2011).

Attempts to soft pedal other hostilities against traditional marriage supporters come off no better. The destruction and theft of pro-Prop 8 signs have been disregarded because they, theoretically, caused no "personal physical harm." Evans & Krehely, *supra*.

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[50] *Available at* http://online.wsj.com/article/SB10001424052748703465204575208453830203396.html?mod=djemEditorialPage_h.

[51] The incident in question is discussed *supra* at 18. Attorneys for the church have posted a "banner photo," *see Bash Back! Photos*, Alliance Defending Freedom, http://oldsite.alliancedefensefund.org/userdocs/BashBackPhoto.jpg, which they assert was featured on the defendant group's web site and shows "members dressed in terrorist-like garb and wielding various objects as weapons," News Release, Alliance Defending Freedom, ADF Files Suit Against Radical Group That Invaded Mich. Church (May 13, 2009), *available at* http://www.adfmedia.org/News/PRDetail /2263.

But many types of harassment – such as death threats or loss of professional opportunities – involve no "physical" harm. Similarly, another source explains that threats against "visible advocates" on "hotly-contested issues" are an "unfortunate reality." Lambda Br. at 27. *See id.* (stating that people "who assume leadership in political campaigns" should not be "subjected to such threats" but it is "unfortunately not uncommon"). Even if true, this hardly makes exposing such threats "cynical[ ]," Lambda Br. at 39, "feint of victimization," *id.* at 4.

Other attempts to downplay harassment are more disheartening. One source, for example, states that certain people who suffered harassment "thrust themselves into a position where an unfriendly reaction was foreseeable." *Id.* at 25. Similarly, the fact that obscene gestures made toward Prop 8 supporters took place while they were holding Prop 8 signs in public places is said to "evidenc[e]" those individuals' "own actions" in directing their speech at a "potentially unfriendly audience," *id.* at 35. Variations of the "she was asking for it" argument are never tasteful.

More generally, some proponents of same-sex marriage have attempted to paint discussion of harassment as a "red herring[ ]" designed to "distract" people from core issues because, the argument goes, support for traditional marriage is losing ground. Evans & Krehely, *supra*. This argument is disingenuous. America should be a place where passionate moral disagreements about important issues such as marriage are expressed with respect, thoughtfulness,

and civility and without fear, or threats of retaliation, on both sides. *See FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 420 (2d Cir. 1982) (explaining that "[s]ociety suffers" when "the free flow of ideas, the lifeblood of the body politic," is reduced). If support for traditional marriage is not as strong as it once was, one possible reason is that the pressure tactics and extreme hostility often associated with same-sex marriage advocacy are bearing fruit. When people who support traditional marriage feel intimidated by the potential for reprisals and harassment merely by donating, signing a petition, holding a sign in public, putting a bumper sticker on their car, or even just going to work, having a free and fair debate on the issue is obviously much more difficult.

Perhaps the most vigorous response to allegations of harassment, however, is the argument that harassment against people who support traditional marriage is "dwarf[ed]" by harassment against people who experience same-sex attraction. Lambda Br. at 5; Evans & Krehely, *supra* (explaining that "crimes" against Prop 8 supporters must be put into "context" by "comparing" them to the number of hate crimes regularly faced by the LGBT community). This argument is obviously and understandably deeply felt but reveals an equally deep misunderstanding of the purpose in exposing harassment against traditional marriage supporters. For their part, *amici* oppose all violence and injustice against any person or institution no matter their viewpoint on marriage. Instead of their speech being "demonize[d] and silence[d],"

Lambda Br. at 4, people who support traditional marriage should feel "open, honest and safe at home, at work and in the community," *id.* at 2, and the same is true, of course, for people who engage in the political process to support redefining marriage. The purpose of shining a light on harassment is to refocus the marriage debate on core issues and to increase civility, not to win an interest group competition.

IV. Adoption of the "*Animus*" Theory Put Forth by Some *Amici* in this Case Would Only Encourage Greater Hostility Against Supporters of Traditional Marriage.

This Court's adoption of the "*animus*" theory advocated by various *amici* supporting reversal in this case could be interpreted as a judicial *imprimatur* upon the hate and contempt many advocates of redefining marriage hold for those who disagree with them, as well as the acts of harassment, intimidation and violence that give expression to those attitudes. Thus, the Court should carefully consider the foreseeable consequences of a decision invalidating Respondents' marriage laws based on a finding of *animus* or "invidious discrimination," including the possibility of continued, and even escalated, acts of hostility in retribution against supporters of traditional marriage.

For example, one group invites the Court to adopt the view that the "widespread national support" for traditional marriage laws adopted in the 1990s and 2000s occurred during a time of "deep-seated anti-gay

attitudes." *See* Br. for Freedom to Marry as *Amicus Curiae* Supporting Petitioners (Mar. 6, 2015) at 29, 30. Thus, they conclude, those voter-approved marriage laws are constitutionally invalid because they "have their roots in a period of rampant, unreflective, and often malicious stereotyping of gay people. ." *Id.* at 31.

Another group likens the basic concept of traditional marriage to the now-discredited, moral evils of slavery, segregation, prohibitions on interracial marriage, and the subjugation of women. *See* Br. of *Amici Curiae* Anti-Defamation League in Support of Petitioners (Mar. 6, 2015) at 5-12. The traditional understanding of marriage, they say, boils down to nothing more than a similarly ignorant "condemnation of gay and lesbian people." *Id.* at 23.

These theories are well summed up by the allegation that the true driving force behind the dozens of state marriage laws adopted to simply retain the traditional understanding of marriage was a "constitutionally repugnant '*animus*' – that is, a desire to disparage or injure gays out of fear, misunderstanding, or dislike." Steve Sanders, *Symposium: Let's be clear – the marriage bans are about animus*, SCOTUSblog (Jan. 16, 2015).[52] Keeping with the ongoing pattern of vilification of proponents of traditional marriage – and even insulting the intelligence of the average

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[52] *Available at* http://www.scotusblog.com/2015/01/symposium-lets-be-clear-the-marriage-bans-are-about-animus/.

voter – the author stokes the flames of anger against the traditional marriage view. He accuses traditional marriage supporters of using "negative code words, moral judgment, and disparagement . . of gays' dignity" to carry out a "fierce political backlash," "exploit[ing] and stimulat[ing] anti-gay prejudice" and causing "voters to react . . emotionally and reflexively." *Ibid.* He argues that voters "actually didn't know what they were doing" and didn't have "sufficient knowledge to deliberate . . . in a sophisticated way," resulting in "knee-jerk moral judgments." *Ibid.*

To a certain degree, those *amici* advancing the *animus* theory in this case gain encouragement from this Court's decision in *United States v. Windsor,* 133 S. Ct. 2675 (2013), which ascribed to large majorities of Congress and the President of the United States improper motives to "disparage and . . injure," *id.* at 2695, "demean," *ibid.*, "impose . . . a stigma," *id.* at 2692, and "humiliat[e]," *id.* at 2694, same-sex couples and their children. The issue, of course, is whether such ill motives can similarly be pinned on the average voter for simply choosing *not* to depart from the longstanding legal understanding of marriage, as compared to Congress' "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2693.

However, the problem with extending *Windsor* to nullify the states' traditional marriage laws by convicting the average voter of harboring irrational hate of gays and lesbians, is that it unfairly brands, by judicial fiat, millions of Americans as bigots. And in

doing so, this Court would ratify – and thereby encourage – the ongoing threats, harassment, and reprisals that people of good faith continue to suffer.

CONCLUSION

Advocates for redefining marriage to include same-sex unions have come to enjoy significant political and cultural power in this country. For evidence of this, the Court need look no further than the mountain of *amicus* briefs filed in support of redefining marriage in this case.

By contrast, supporters of traditional marriage today live under the real and constant threat of harassment and intimidation, even though "until recent years, many citizens had not even considered the possibility" of same-sex marriage. *Windsor,* 133 S. Ct. at 2689. "For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Ibid.* Now, that very viewpoint is at risk of being condemned as *irrational bigotry* by the highest court in the land.

This Court should reject any argument made in this case that support for traditional marriage is irrational, bigoted, or worse. Declaring the traditional view of marriage to be rooted in illegitimate, hateful malice *per se* would encourage even greater hostility than already exists against those who simply seek to

preserve marriage as a fundamentally pro-child social institution that benefits all society.

The judgments of the Court of Appeals should be affirmed, and the challenged marriage laws should be upheld.

Respectfully submitted,

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